

Service Date: April 8, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application of)	UTILITY DIVISION
PACIFICORP for Approval of its Electric)	
Utility Restructuring Transition Plan Filed)	DOCKET NO. D97.7.91
Pursuant to Senate Bill 390)	ORDER NO. 5987d

ORDER DENYING MOTION FOR RECONSIDERATION
AND GRANTING PACIFICORP'S REQUEST TO
FILE THE LAST ROUND OF TESTIMONY

Introduction

1. On March 26, 1998, PacifiCorp filed a Motion to Reconsider the March 11, 1998 Commission Action, or Alternative Motion to Allow PacifiCorp to File Testimony Responsive to Intervenor's Surrebuttal. On March 27, 1998, PacifiCorp filed an amendment to the Motion, stating that the motion to file testimony was separate, not in the alternative.

2. On March 30, 1998, Plum Creek Timber Company, L.P., (Plum Creek) filed its Response opposing both the motion for reconsideration of the March 11 Commission Action and the motion for permission for PacifiCorp to file the last round of testimony in response to Intervenor's Rebuttal. Montana Consumer Counsel (MCC) opposed the motion for reconsideration, concurring in Plum Creek's reasons in its Response. MCC was silent on PacifiCorp's request to file the last round of testimony.

3. At its duly noticed work session on March 31, 1998, the Commission denied the motion for reconsideration of its actions on March 11, 1998 and granted the motion for permission to file the last round of testimony in response to Intervenor's Rebuttal. To accommodate the filing of this last round and additional discovery, the Commission granted the preference of PacifiCorp to postpone the hearing tentatively scheduled for July 20, 1998 on all issues other than those to be considered in the May 19-20, 1998 hearing on large customer choice and other issues with July 1, 1998 deadlines under Senate Bill 390 passed by the 1997 Montana Legislature.

Background

4. On July 1, 1997, pursuant to Senate Bill 390 which is now codified at §§ 69-8-101 through -503, Montana Code Annotated (MCA), PacifiCorp filed its Electric Restructuring Transition Plan with the Commission. On September 15, 1997 at its duly noticed work session, the Commission determined that PacifiCorp's plan was not complete and adequate in accordance with the Act. The Commission issued its Preliminary Determination and Order on Transition

Plan on September 22, 1997 (Order No. 5987b), as required by its Procedural Order No. 5987 pursuant to § 69-8-202(2), MCA. The Commission determined that PacifiCorp's transition plan was incomplete and inadequate with respect to (1) transition costs, which should reflect all reasonable mitigation and the value of all generation assets, liabilities and supply costs based on one of the valuation methods in the Act; (2) functional separation of rate base and expense items related to electricity supply, retail transmission and distribution and regulated and unregulated retail energy services; and (3) proposed pilot programs. The Commission determined that a complete and adequate plan should contain all the basic information needed to evaluate the filing, including quantitative and qualitative analyses and documentation of methods used. The Commission stated: "Parties should not have to spend discovery time to get basic supporting information." (Order No. 5987b, ¶¶ 10-11.) The Commission noted other deficiencies in phasing in customers, methods for choosing a supplier, customer education and marketing. (¶¶ 15-17.)

5. The Commission directed PacifiCorp to file a revised plan remedying the deficiencies. PacifiCorp filed its Revised Plan on October 13, 1997. MCC and Plum Creek Timber Company, L.P., did discovery and prefiled testimony in January.

6. On February 17, 1998, PacifiCorp filed Objections to Data Responses, Motion to Compel, and Motion to Amend Procedural Schedule. PacifiCorp stated that despite cooperation, problems arose with MCC's responses to PacifiCorp data requests, in particular requests addressing the testimony of MCC's witness, Richard S. Albert on market clearing prices of generation in a competitive market. PacifiCorp outlined the efforts to obtain site visits and maintained that MCC had not made it known that additional data responses would benefit from the February 10, 1998 on-site visit. PacifiCorp objected to MCC Data Responses 86(b), 92(a) and (b), 114, 115, 118(b), 119, 121, 122, 127, and 128(a). Further, PacifiCorp requested an Order compelling Mr. Albert to respond to the PacifiCorp Data Requests listed above. PacifiCorp also moved to amend the Procedural Schedule to require MCC to respond and allow PacifiCorp two weeks after receipt of responses to file Rebuttal Testimony, moving all subsequent procedural deadlines.

7. On February 24, 1998, PacifiCorp filed Rebuttal Testimony.

8. On March 2, 1998, PacifiCorp filed its Amendment to its previously filed Objections to Data Responses, Motion to Compel and Motion to Amend Procedural Schedule and Submission of Alternative Motion to Strike. PacifiCorp stated that it was able to obtain sufficient data to file Rebuttal Testimony on aspects of LCG's model. However, PacifiCorp maintained it had not had an opportunity to acquire sufficient information to fully understand how the LCG "Network Power Model" functions because LCG did not appropriately respond to

PacifiCorp data requests. PacifiCorp repeated that had it known of the 22 other responses requiring a site visit, the February 10, 1998 site visit could have been expanded.

9. MCC responded to PacifiCorp's Motions on March 4, 1998. MCC stated that it had requested that PacifiCorp be specific with respect to information it believed was not provided. MCC maintained that PacifiCorp's rebuttal testimony indicated that PacifiCorp's witnesses had obtained "a significant amount of information." Asserting that MCC was continuing to cooperate on discovery matters, MCC said that it believed that MCC's supplemental responses had provided the information. MCC maintained that the Motion to Strike was premature, pointing out that on objections to data responses the normal remedy is to rule on them and to give the party an opportunity to supplement the responses.

10. On March 5, 1998, at a duly noticed work session the Commission denied PacifiCorp's motion to strike as premature. The Commission noted that the parties had continued to work on discovery matters, and there was no indication that MCC had precluded another site visit. On the motion to compel answers to discovery, the Commission directed Staff to continue to work with the parties on discovery concerns.

11. On March 9, 1998, Montana Consumer Counsel (MCC) filed a motion to amend the procedural schedule to allow intervenors the opportunity to submit additional intervenor testimony, noting the following on PacifiCorp's filing of its transition plan: (1) PacifiCorp's 22 page initial filing on July 1, 1997 was deemed deficient by Commission; (2) PacifiCorp's Revised Transition Plan filing on October 15, 1997, was still scant; (3) MCC's intervenor testimony was filed January 16, 1998, with independent market price study and forecast for estimating stranded costs; (4) PacifiCorp's Rebuttal Testimony was filed February 24, 1998, significantly more substantial than the revised, with new issues.

12. MCC maintained that the Rebuttal Testimony was actually response testimony to which MCC's witnesses should have an opportunity to respond. Instead of successive rounds of testimony becoming smaller, they became larger as parties struggled to develop issues. MCC stated that it was essential to develop a full record on issues of first impression, allowing parties to address expanded issues and rebuttal to what is essentially response testimony. Therefore, MCC requested the opportunity to file "surrebuttal" testimony, which would not be feasible with the hearing scheduled March 24, 1998. MCC proposed that the Commission postpone the hearing and convene a scheduling conference to set a May hearing date, with the possibility of an interim open access tariff by July 1, 1998.

13. PacifiCorp replied that MCC's motion was not specific enough to support the relief requested, including what issues are "new" and what issues merit revising the procedural schedule. PacifiCorp maintained that its February 24 testimony was properly rebuttal to Intervenor's prefiled testimony and that PacifiCorp offered nothing "new" in simply criticizing

the model of MCC's witness. PacifiCorp stated that it had provided full opportunity for discovery on its rebuttal, including an on-site visit March 12. PacifiCorp expressed the concern that large customers must be afforded access on July 1, 1998, and desired a final order before that date.

14. The Department of Environmental Quality and Northwest Power Planning Council (DEQ/NPPC) opposed the motion to reschedule the hearing, believing that the delay could impair the ability to meet the statutory deadline for large customer choice by July 1, 1998 and all other customers by July 1, 2002 under the Act. DEQ blamed PacifiCorp for any delay necessitated by rescheduling, because its plan failed to provide sufficient information to comply with the Act. "PacifiCorp should not be allowed to delay the transition to customer choice based on its own failure to provide an adequate plan." DEQ indicated that the remedy would be to go to hearing on March 24, 1998 and let PacifiCorp suffer the consequences in a possible modification of its transition plan to comply with the Act.

15. Plum Creek Timber Company (Plum Creek) responded, agreeing with MCC, that PacifiCorp's "rebuttal" testimony expanded, rather than narrowed, the scope of issues. PacifiCorp introduced new information, claims and elements which it should have included in its principle case, including: (1) proposed inclusion of "Montana Border Customers" and strip mines in stranded costs; (2) a new market price credit proposal; (3) a series of new tariff schedules; (4) and an "extraordinary 14-page proposed 'Rule 18,' purporting to establish extensive requirements for Customer Choice Direct Access." Plum Creek stated that while striking PacifiCorp's new material would be an appropriate option, doing so would limit rather than enhance the record and the ensuing legal dispute would further delay proceedings.

16. Plum Creek maintained that intervenors are entitled to respond to PacifiCorp and that the Commission is entitled to a comprehensive record. Cross-examination alone would not suffice, where there is new information and claims. Therefore, Plum Creek joined in MCC's request that intervenors be allowed to provide "surrebuttal" testimony. While this surrebuttal could be provided live at the hearing on March 24, additional discovery and pre-filed surrebuttal testimony would produce a more comprehensive record, stated Plum Creek.

17. Plum Creek recognized the "dilemma . . . created by PacifiCorp's expanded filing," in that an unbundled tariff for large customers is required by July 1, 1998 and that a utility cannot recover stranded costs until a Commission determination is made based on an affirmative showing. If the Commission extended the schedule to allow developing of the record and to adopt a limited interim tariff, then Plum Creek proposed that the limited tariff be exclusive of transition charges, subject to a simple accounting order to protect PacifiCorp's interest.

18. At its work session on March 11, 1998, the Commission granted MCC's motion, vacating the hearing date scheduled to begin on March 24, 1998 in Kalispell, Montana and

allowing intervenors the opportunity to file surrebuttal testimony to the Rebuttal Testimony filed by PacifiCorp on February 24, 1998. The Commission further directed Commission Staff to set a scheduling conference with the parties which would establish a procedural order with the following requirements: (1) an opportunity for intervenors to file testimony in rebuttal to the testimony filed by PacifiCorp on February 24, 1998, and any necessary corresponding discovery; (2) a deadline for parties to provide an interim tariff for PacifiCorp's July 1, 1998 statutory requirement to provide choice to qualifying large customers and a proposed accounting order, for the Commission's approval; (3) an alternative date for a one-day hearing in May 1998 in Helena, Montana for the sole issue of choice for the five qualifying large customers entitled to choice on July 1, 1998, if parties have not presented and received Commission approval of an interim tariff and accounting order; (4) a hearing date on all issues, including but not limited to transition costs, customer choice and pilot programs, preferably in July or August; and (5) a final order on all issues in September, 1998. The Commission suspended the Procedural Schedule in Order No. 5987, to be rescheduled in a procedural conference.

19. Commission Staff, PacifiCorp, MCC, Plum Creek and DEQ convened a telephonic procedural conference on March 26, 1998. Parties and Staff developed a procedural schedule with a hearing set for May 19 and 20, 1998 in Helena, Montana on the issues related to customers entitled to choice on July 1, 1998 and a full hearing on all issues to begin on July 20, 1998 in Kalispell, Montana. At this procedural conference, PacifiCorp outlined its soon-to-be filed motions for reconsideration of the Commission's action or alternatively, for permission to submit the last round of testimony. Intervenors agreed to submit responses to the motions by 5:00 p.m., Monday, March 30, 1998.

20. PacifiCorp's Motions on March 26 and 27, 1998. (1) Motion for Reconsideration: PacifiCorp first requested that the Commission reconsider its action on March 11, 1998, in which the Commission granted Montana Consumer Counsel's (MCC) motion to vacate the hearing date of March 24, 1998 and allow Intervenors the opportunity to file testimony in rebuttal to testimony filed by PacifiCorp on February 24, 1998. PacifiCorp asked for clarification on the scope of intervenor surrebuttal testimony ("new" issues raised or all issues raised in PacifiCorp's testimony). PacifiCorp maintained that allowing Intervenors to respond on all issues would restart the process and broaden the scope of discovery. PacifiCorp also asked for guidance on the scope of the surrebuttal testimony afforded MCC to respond to PacifiCorp testimony. PacifiCorp maintained that it should be limited to testimony addressing the Lotus Consulting Group (LCG) model, i.e., witnesses Moriss and Costa (and "new" issues). Finally, PacifiCorp asked the Commission to set forth the basis of its findings on its action, as part of its Motion for Reconsideration.

21. Alternative Motion to Allow PacifiCorp to file "last word" responsive testimony. If the Commission rejected the Motion for Reconsideration, PacifiCorp's 3/26 motion and brief requested an alternative order "that allows the party with the burden of proof in this contested case" (PacifiCorp) to file the last round of testimony. The 3/27 amendment asked that the Commission act on its request to file last round testimony separately from the motion for reconsideration.

22. Intervenors' responses. MCC recommended denying the motion to reconsider the action of March 11. MCC did not oppose the separate Amended Motion, which would allow PacifiCorp to file the last round of testimony. Plum Creek disagreed that the Commission's direction and action of March 11 required clarification, maintaining that PacifiCorp in reality wanted to limit parties and staff to a narrow discovery. Plum Creek stated that PacifiCorp had greatly expanded its filing in response to Intervenors, and therefore it was "hypocritical" to complain about the Commission's allowing intervenors to respond to the inflated responsive filing, although the plan was still inadequate. Plum Creek asserted that PacifiCorp had cited no authority that it was denied due process by not being allowed to file "sur-surrebuttal" (Alternative Motion). Plum Creek believed that PacifiCorp's three rounds of testimony, plus supplemental testimony on MCC's model, were more than an adequate opportunity to have its say. Maintaining that the real issue was PacifiCorp's "continued resistance to" developing a complete record, not due process, Plum Creek requested that the Commission deny PacifiCorp's motions, affirm its March 11 action, and adopt the new procedural schedule.

Discussion and Findings

23. The Commission finds that PacifiCorp failed to fulfill its obligations under Senate Bill 390, first in filing a skimpy, non-compliant plan on July 1, 1997. The Commission directed PacifiCorp to file a complete and adequate plan in its Preliminary Determination (Order No. 5987b, issued September 22, 1997). When PacifiCorp filed its revised plan, it still did not satisfy the requirements of Senate Bill 390. To this date, the Company has yet to file a full, complete and adequate transition plan. Intervenors make a convincing argument that PacifiCorp shifted the burden of proof to the Intervenors. Therefore, the intervenors were forced to acquire data from the company through discovery, perform their own market analyses and construct a more nearly complete transition plan for the company as part of their response testimony. In turn, PacifiCorp reacted like an intervenor, criticizing the intervenors' analyses and, for the first time, submitting testimony that addressed a range of issues not addressed in their original and revised filings. Because of the reversal of roles in this case, the Commission allowed the intervenors the opportunity to respond to PacifiCorp's testimony. The Commission in its action on March 11, 1998, granted Intervenors' motions, thereby vacating the hearing date and allowing Intervenors the opportunity to file rebuttal testimony.

24. The Commission had the option under Senate Bill 390 of going to hearing on March 24, 1998, and then modifying, rejecting or denying PacifiCorp's transition plan on the basis of PacifiCorp's failure to present a complete and adequate plan (§ 69-8-202(3), MCA). However, this option might have been suboptimal in terms of achieving competitive markets and the intent of Senate Bill 390. In its action of March 11, 1998, the Commission determined that delaying the hearing to July or August to allow the intervenors to conclude discovery and prefile surrebuttal would more likely make possible a full and complete record in order to ensure the best possible outcome for the public interest. The Commission determined that the legislative mandate for choice on July 1 for large customers could be accommodated in a separate, earlier hearing. The Commission recognized that the five large customers in PacifiCorp's service territory are entitled to choice on July 1, 1998, and directed Staff to set a hearing in May, 1998 to lead to an interim tariff for those customers, and an accounting mechanism, pending the final hearing.

25. As part of its Motion for Reconsideration, PacifiCorp requested clarification of the Commission's action on March 11, 1998. In denying the Motion for Reconsideration of its action, the Commission determines that Intervenors indeed have the right to file full rebuttal on all issues. The Commission finds persuasive Intervenors' position that PacifiCorp did not have anything approaching a complete and adequate transition plan until PacifiCorp filed "Rebuttal Testimony" on February 24, 1998. At this time, PacifiCorp's filing still appears to be lacking requisites of a complete plan, as indicated by Intervenors' motions and briefs. With Intervenors' filing rebuttal testimony and PacifiCorp having the right to file the last round of testimony, along with additional discovery, the Commission should have a more robust and comprehensive record on which to make its final decision. Therefore, the Commission grants PacifiCorp's request to file the last round of testimony and further grants Plum Creek and other Intervenors the opportunity to do additional discovery on PacifiCorp's last round.

26. The Commission will duly notice, publish and conduct the hearing on the issues related to large customer choice (the July 1, 1998 deadline) on May 19-20, 1998 in the Commission's hearing room in Helena, Montana. Staff will work with parties to develop the final procedural schedule, with a hearing on all issues to begin at 9:00 a.m. on August 25, 1998 in Kalispell, Montana, at a place to be later determined.

Conclusions of Law

1. The Commission exercises authority over public utilities and the electric utility industry restructuring pursuant to its authority under Title 69, particularly Chapters 3 and 8, MCA. PacifiCorp is a public utility subject to the Commission's jurisdiction and authority, and the Intervenors in intervening in the contested case proceeding likewise are subject to the Commission's authority, including the authority to set the procedural schedule, hold the contested

case proceeding, and ultimately accept, reject or modify PacifiCorp's transition plan under Title 69, Chapter 8, MCA.

Order

WHEREFORE, the Commission denies PacifiCorp's Motion for Reconsideration of the Commission's action on March 11, 1998 and grants PacifiCorp's Motion to file the last round of testimony prior to the final hearing on its Transition Plan.

Done and dated this 7th day of April, 1998.
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.